NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Marsman*, 2007 NSCA 65

Date: 20070528
Docket: CAC 270531
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Charles Marlowe Marsman

Respondent

Judges:	MacDonald, C.J.N.S.; Saunders and Oland, JJ.A.
Appeal Heard:	March 30, 2007, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of MacDonald, C.J.N.S.; Saunders and Oland, JJ.A. concurring.
Counsel:	Daniel MacRury, Q.C., for the appellant Joel E. Pink, Q.C., for the respondent

Reasons for judgment:

[1] The respondent, Charles Marlowe Marsman, after pleading guilty to aggravated assault, received a suspended sentence from Supreme Court of Nova Scotia Justice Felix A. Cacchione. The victim is a police officer who, at the time of the assault, was engaged in the lawful execution of his duty. The Crown appeals, asserting that, in the circumstances, this disposition is simply too lenient. Respectfully, I agree. I would grant leave, allow the appeal and direct a two-year less one day term of incarceration. Given the exceptional circumstances of this offender, I would further direct that his sentence be served in the community.

BACKGROUND

[2] By all accounts, Mr. Marsman administered a vicious beating on Halifax Regional Police Officer Sean Martin.

[3] On February 7, 2005, Officer Martin was patrolling in his police vehicle along Gottingen Street. He came upon Mr. Marsman who was standing with another man on the corner of Gottingen and Uniacke Streets. Mr. Marsman was carrying an opened case of beer. As the police vehicle passed, a beer bottle was thrown and smashed. Officer Martin believed Mr. Marsman to be responsible for this; something Mr. Marsman has persistently denied. In any event, Officer Martin turned his vehicle and approached Mr. Marsman. In the process, Mr. Marsman claimed to have been brushed by the vehicle. Officer Martin denies this.

[4] There followed a verbal exchange while Mr. Marsman walked away. Officer Martin continued in his efforts to make an arrest for Mr. Marsman's obvious *Liquor Control Act* violation. He put his hand on Mr. Marsman's shoulder. Suddenly, Mr. Marsman, who was clearly agitated throughout, "lost it" and attacked the officer with his fists. Being 6' 2" tall and weighing 230 pounds, he quickly overpowered the officer. The sentencing judge described the incident this way:

> ¶19 In the present case there was a violent assault on a peace officer who was in the execution of his duties under the *Liquor Control Act.* It began when Constable Martin noticed the accused carrying an open case of beer. As the Constable drove past the accused a beer bottle was broken. The officer believed that the accused had thrown the beer. The accused denies that he did. Nothing

> turns on whether or not he threw the beer because at that point the officer believed that he had reasonable and probable grounds and was about to confront Mr. Marsman with respect to this.
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> ¶20 Mr. Marsman denied to the officer that he had thrown the beer and continued walking away. The officer attempted to arrest him and again Mr. Marsman walked away. The second attempt at arrest by the officer placing his hands on the accused led Mr. Marsman to the violence that he inflicted and the present charge. Mr. Marsman ran away but was later apprehended. As I have stated at the time of his apprehension he told the officers that he wanted to be shot and kept saying things such as "shoot me, shoot me".

[5] The judge described the officer's injuries in the wake of the attack:

> ¶3 The incident before this Court can only be described as a vicious beating of a short duration. Constable Martin suffered several cuts to his face which required suturing. His face was bruised and swollen. There was also a laceration to the back of his head. The officer lost consciousness but did not require hospitalisation other than to be examined and to have the laceration sutured. He was released the same day but did not return to work for a period of six weeks on doctor's orders because he had suffered a concussion. He was initially placed on light duties but returned to his regular duties in April of that year.
>
> ¶4 Constable Martin testified at the sentencing as did Mr. Marsman. Constable Martin only recalled grabbing the accused in order to place him under arrest. He has no memory of what occurred after that or how it occurred. The accused in his testimony did not downplay the severity of the beating. He acknowledged being really angry at the time of the incident. He said in his evidence and I quote “I lost it and I gave him everything I had”. The incident was of short duration due to the speedy arrival of other police officers. The accused ran from the scene and was apprehended a short distance away after being pepper sprayed on three occasions. At the time of his apprehension the accused was telling the police officers that they would have to kill him or shoot him.

[6] Why would Mr. Marsman react so violently in circumstances that objectively would not appear to be particularly volatile? The judge attributed it to Mr. Marsman's mental illness exacerbated by pent-up anger. This anger emanated from a troubled past generally, and specifically from an incident where Mr. Marsman, while living in Toronto, purportedly saw his friend being beaten by the police. In reaching this conclusion, the judge relied heavily on the expert opinion of forensic psychiatrist Dr. Stephen Hucker. The judge wrote:

> ¶11 Mr. Marsman was assessed by Dr. Stephen Hucker, a forensic psychiatrist. Dr. Hucker states that Mr. Marsman has been aware for a number of years that he has emotional problems but has not until recently received assistance for these problems. Dr. Hucker described him as a complex case. His unsettled home life, that is, moving back and forth between his mother's home in Toronto and his father's in Halifax together with the various times when he was not living with his mother or his father and in fact on one occasion was living on the streets has contributed to his problems along with racial alienation and a lack of clear sense of identity.
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> ¶12 Dr. Hucker diagnosed him as suffering from post traumatic stress disorder, chronic type, as well as having features of a generalized anxiety disorder or adjustment disorder with mixed disturbance of emotions and conduct chronic type. There is also a suggestion of a personality disorder but that does not appear to be clear from the report.
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> ¶13 Dr. Hucker explained the actions of Mr. Marsman on the date in question as a re-experiencing of a previous traumatic event. That is, the beating of his friend in Toronto by a police officer. He also described him as attempting to avoid a confrontation with Constable Martin and when he was unable to do so, exploding with anger which he had suppressed from the previous traumatic events years ago. His ability to control his behaviour was severely compromised at the time of the incident according to Dr. Hucker and the doctor views Mr. Marsman as still being at risk for continued emotional problems. However, Dr. Hucker believes that Mr. Marsman is very receptive to mental health treatment and would likely benefit considerably from such treatment. Mr. Marsman was referred to a psychiatrist, Dr. Wawer, by his family physician. That psychiatrist assessed him as having a major depressive disorder. She states that he showed a willingness and commitment to commence treatment. He has been seeing that doctor since April of this year and his latest meeting was in June of this year. He did miss his August session but did call to reschedule that appointment. He has been taking his medication. He has, according to Dr. Wawer, shown both an openness and a willingness to be an active participant in his psychiatric care. He is aware that much works needs to be done.

[7] The Crown took issue with Dr. Hucker's evidence asserting that it reflected Mr. Marsman's subjective self-serving account of events. However, the judge disagreed and in the process found Mr. Marsman to be genuinely remorseful:

> ¶21 Much has been made by the Crown as to the discrepancies in Dr. Hucker's report as to what the accused told Dr. Hucker. It has been characterized as lies.

> While there are some discrepancies in the self reporting by the accused to Dr. Hucker, to characterize these discrepancies as lies ignores the fact that two psychiatrists have independently concluded that the accused suffers from a major mental illness. The absence of certain things in Mr. Marsman's reporting to Dr. Hucker can also be viewed in the context of the reporter who is suffering from such a mental illness.
>
> ¶22 I have had the opportunity of assessing the accused myself when he gave his evidence in court and by watching his video taped statement. It is clear from these observations that Mr. Marsman is emotionally labile. The tears shed both in court and at the police station were in my opinion genuine as was the remorse expressed both in court and on the video.

[8] At the sentencing hearing, Mr. Marsman as well presented the judge with letters and *viva voce* evidence; all demonstrated significant family and community support. His supporters insisted that this attack was totally out of character for Mr. Marsman and they implored the judge to spare him jail time.

[9] In the end, while acknowledging the viciousness of the attack, the judge zeroed in on Mr. Marsman's mental illness. This prompted him to emphasize rehabilitation as opposed to deterrence and denunciation. The result was a three-year suspended sentence. The judge reasoned:

> ¶25 In the present case the aggravating factors are the viciousness of the assault and the fact that it was perpetrated on a police officer who was simply executing his duties. The mitigating factors are the accused's guilty plea, his genuine remorse, the fact that he has no adult criminal record and his mental illness. While that illness is not a justification for his actions it does however give some context to those actions. To incarcerate this young man who suffers from a mental illness so that he and others will be deterred in future from committing similar offences and to denounce his actions ignores the reality that society will not be protected in the long term if his illness is not treated. The Crown has stated that he can obtain the help required in a federal institution. This submission, in my opinion, does not take into consideration the wait times for mental health treatment in a federal institution and more importantly the fact that the accused, who has had only minimal contact with the criminal element, will be housed with seasoned professional criminals. He will come into contact with persons who have proven repeatedly that they have no respect for authority, the law and societal conventions. The accused's mental health will be at further risk of deterioration by his contact with such individuals. Society will be protected for the short term if he is incarcerated but it will not be protected in the long term because eventually he will be released without having the proper treatment and

> after having his emotions and anger fuelled by others who have clearly shown a disrespect for the law and society.
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> ...
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> ¶28 In my opinion a fit and proper sentence should be one which will ensure that there are no further incidents of this nature by the accused and this can only be achieved by addressing his mental health issues and by bringing home to him that he can be a productive member of his community if he addresses those mental health issues which continue to plague him.
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> ¶29 I propose to suspend the passing of sentence because in this way the Court can best monitor his behaviour by holding over his head the possibility that if he does not comply with the terms of the sentence imposed he can be brought back before this Court and sentenced as if today had not occurred.

ISSUES

[10] The Crown lists only two grounds of appeal, both of which target the adequacy of the sentence:

> 1. THAT the sentence ordered inadequately reflects the objectives of denunciation and deterrence.
>
> 2. THAT the sentence ordered is inadequate having regard to the nature of the offence committed and the circumstances of the offence and the offender.

[11] Essentially, these grounds can be distilled to one basic issue. It is the Crown's fundamental assertion that no matter how remorseful Mr. Marsman may be or no matter how out of character his actions may appear, a suspended sentence is simply too lenient for such a serious offence committed in such a brutal fashion.

STANDARD OF REVIEW

[12] In testing the Crown's assertion that the sentence was inadequate, it is not for us to simply settle on what we feel would have been an appropriate disposition. Instead, a sentencing judge's conclusion is entitled to deference. There is a good reason for this. Sentencing arguably represents the most challenging task for any judge. A host of important but often competing factors must be carefully considered and then balanced. With no prescribed formula, the judge must craft the

disposition most appropriate in each unique set of circumstances. Thus, this important exercise of judicial discretion commands significant deference.

[13] In short, we must accept Justice Cacchione's conclusion unless he applied some wrong principle of law or the sentence is clearly unreasonable. As Iacobucci, J. noted in **R. v. Shropshire**, [1995] 4 S.C.R. 227:

> ¶46 An appellate court should not be given free reign to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. *That is to say, that it has found the sentence to be clearly unreasonable.*
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> ¶47 I would adopt the approach taken by the Nova Scotia Court of Appeal in the cases of **R. v. Pepin** (1990), 98 N.S.R. (2d) 238, and **R. v. Muise** (1994), 94 C.C.C. (3d) 119. In **Pepin,** at p. 251, it was held that:
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> > *... in considering whether a sentence should be altered, the test is not whether we would have imposed a different sentence; we must determine if the sentencing judge applied wrong principles or [if] the sentence is clearly or manifestly excessive.*
>
> [Emphasis added.]

[14] As this court observed in **R. v. Longaphy**, [2000] N.S.J. No. 376 (Q.L.) (N.S.C.A.), an overemphasis of an appropriate factor can constitute an appealable error in principle:

> ¶20 A sentence imposed by a trial judge is entitled to considerable deference from an appellate court. A sentence should only be varied if the appellate court is satisfied that the sentence under review is "clearly unreasonable": **R. v. Shropshire** (1995), 102 C.C.C. (3d) 193 (S.C.C.) at pp. 209-210. *Absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors*, a court of appeal should only intervene to vary a sentence if the sentence is "demonstrably unfit": **R. v. M.(C.A.)** (1996), 105 C.C.C. (3d) 327 (S.C.C.) at p. 374. The Supreme Court of Canada reiterated this standard of appellate review in reviewing a conditional sentence in **R. v. Proulx** (2000), 140 C.C.C. (3d) 449, [2000] 1 S.C.R. 61 at [paragraph] 123-126.

[Emphasis added.]

ANALYSIS

[15] Let me begin by detailing the comprehensive principles of sentencing that the judge was tasked to apply. They are set out in the *Criminal Code*.

> 718. Purpose -- The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
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> (a) to denounce unlawful conduct;
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> (b) to deter the offender and other persons from committing offences;
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> (c) to separate offenders from society, where necessary;
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> (d) to assist in rehabilitating offenders;
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> (e) to provide reparations for harm done to victim or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.
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> 718.1 Fundamental Principle -- A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
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> 718.2 Other Sentencing Principles -- A court that imposes a sentence shall also take into consideration the following principles:
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> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender ...
>
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances; ...

> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
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> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[16] In sentencing Mr. Marsman, as noted, the judge was clearly focused on the offender's rehabilitation as a means to protect the public. I can understand this given Mr. Marsman's genuine remorse, challenging mental illness and extraordinary community support. That said, deterrence and denunciation must as well be appropriately addressed. In this regard, I agree with the Crown that this crime cries out for punishment more severe than a suspended sentence. I say this primarily for two reasons. My first reason is general in nature and goes to the gravity of the crime charged. Aggravated assault represents a very serious and violent crime. My second reason is specific and involves the vicious nature of this particular attack upon a vulnerable and unsuspecting police officer who was simply trying to do his job. Let me elaborate on each.

The Crime of Aggravated Assault

[17] In Canada, assault charges are organized along a continuum depending upon the severity of the attack. They range from the least serious *common* assault to the ultimate “assault” - murder. Short of culpable homicide, aggravated assault represents the most serious indictment. It involves either wounding, maiming, disfiguring or the endangerment of life and carries a potential punishment of fourteen years:

> 268. (1) - Aggravated Assault - Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.
>
> (2) Every one who commits an aggravated assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

[18] **R. v. D.S.K.**, [2005] S.J. No. 97 (Sk.C.A.), Cameron, J.A. placed the seriousness of aggravated assault into context:

> ¶22 Judges are required, of course, to sentence offenders in accordance with the purpose, objectives and principles of sentencing found in sections 718, 718.1 and 718.2 of the Criminal Code. This includes the fundamental principle that "a

> sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."
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> ¶23 The gravity of an offence lies in the nature and comparative seriousness of the offence, in the circumstances of its commission, and in the harm caused.
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> ¶24 Aggravated assault consists of wounding, maiming, disfiguring, or endangering the life of another person, according to section 268(1) of the Code, and constitutes an indictable offence. That is the nature of the offence. Some indication of the comparative seriousness of the offence is apparent on the face of the provisions of the Criminal Code regarding various forms of assault. In the scheme of these provisions, assault is an offence against the person, and it ranges through common assault, assault causing bodily harm, sexual assault, aggravated assault, sexual assault with a weapon, and so on.
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> ¶25 The first, second, and third of these are either indictable or summary conviction offences, which are potentially punishable in their indictable version by imprisonment of up to five years in the case of the first, and up to ten years in the case of the second and third. The fourth, aggravated assault, is an indictable offence, potentially punishable by imprisonment of up to fourteen years. So is sexual assault with a weapon other than a firearm. In this lies Parliament's general view of the comparative seriousness of aggravated assault.

The Assault on Officer Martin

[19] While the exact details leading up to the attack remain in dispute, two things are clear: (1) Officer Martin has reasonable grounds to attempt the arrest, and (2) Mr. Marsman responded by beating the officer to the point of unconsciousness.

[20] Police officers, day in and day out, serve and protect our communities from harm. When they are attacked, in many ways, we are all victimized. In **R. v. McArthur**, [2004] O.J. No. 721 (Ont. C.A.), Doherty, J.A. put it poignantly:

> ¶49 As indicated above, the maintenance of a just, peaceful and safe society is the fundamental purpose of sentencing. Police officers play a unique and crucial role in promoting and preserving a just, peaceful and safe society. We rely on the police to put themselves in harm's way to protect the community from the criminal element. At the same time, we rely on the police to act with restraint in the execution of their duties and to avoid the use of any force, much less deadly force, unless clearly necessary. Violent attacks upon police officers who are doing their duty are attacks on the rule of law and on the safety and well-being of the community as a whole. Sentences imposed for those attacks must reflect the

> vulnerability of the police officers, society's dependence on the police, and society's determination to avoid a policing mentality which invites easy resort to violence in the execution of the policing function: **R. v. Forrest** (1986), 15 O.A.C. 104 at 107 (C.A.).

[21] In **R. v. Sturge**, [2001] O.J. No. 3923, the Ontario Court of Appeal again highlighted the dangers police officers face incidental to arrest and thus the need to highlight general deterrence and denunciation:

> ¶9 As with the dangerous driving conviction, general deterrence and denunciation had to be given paramount consideration. Police officers who are required to put themselves at risk to make arrests must be assured that those who physically resist arrest will be dealt with sternly by the courts. ...

[22] In light of the above, I conclude respectfully that the judge, in his quest to promote rehabilitation, failed to adequately address the goals of deterrence and denunciation. In fact, the judge concluded that denunciation and deterrence need not be stressed in this case:

> ¶26 *In the present case while there is a need for deterrence and denunciation, these are not the factors which must be stressed in order to protect society. Rather the emphasis should be on reformation and rehabilitation.* Mr. Marsman has demonstrated a willingness and commitment to address his mental health issues. He has the support of his family, his friends and the community and he has shown, in the past through his volunteer work in the community, that he can be an even more productive member of society than he already has been. To incarcerate him at this stage would simply be sacrificing him on the altar of general deterrence. The results would be only a short term protection of society.
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> [Emphasis added.]

[23] Respectfully, this approach constitutes an error in principle by reflecting an overemphasis on rehabilitation. Furthermore, by concluding that denunciation and deterrence need not be stressed in these circumstances, the error is compounded. In other words, the laudable objective of rehabilitation was emphasized to the point of overshadowing the important goals of deterrence and denunciation. Furthermore this ultimately prompted the judge to impose a disposition that I believe was, in these circumstances, clearly unreasonable.

The Appropriate Disposition

[24] Having reached this conclusion, it now falls to us to consider an appropriate disposition. See: *Criminal Code*, s. 687, and **R. v. C.A.M.**, [1996] 1 S.C.R. 500 at paras. 88-92. In doing so, we must consider not only the entire record originally placed before the sentencing judge, but also the additional *fresh evidence* filed by Mr. Marsman with the consent of the Crown. This additional material includes updated reports from Mr. Marsman's psychiatrist and probation officer and supports his contention that all conditions of his original sentence have been complied with and that he continues to make significant strides toward rehabilitation.

[25] Harkening back to the statutory principles of sentencing, an appropriate disposition in this case must more effectively address the principles of deterrence and denunciation while at the same time balancing the obvious need to see Mr. Marsman rehabilitated.

[26] As a starting point, given the seriousness of this crime generally and the circumstances of this particular attack, and for the reasons noted above, the principles of deterrence and denunciation can only be properly addressed through a period of incarceration. In my view, this is unavoidable.

[27] I turn now to the next question. Is a federal term of two years or more required or can the objectives of deterrence and denunciation still be adequately addressed with a lesser term? In attempting to answer this question I must consider all the circumstances of this case, including the viciousness of this attack on an unsuspecting officer. However, I am also mindful of the special mitigating circumstances surrounding this offender. As noted, they include his sincere and constant remorse, his lack of an adult record, his mental illness and his overwhelming community support. In the end, despite the gravity of this charge, I believe that these mitigating factors coalesce to render a federal term of incarceration unnecessary.

[28] By narrowing the appropriate disposition to a term of incarceration under two years, I must now consider the option of having Mr. Marsman serve this term in the community as opposed to in jail. Section 742.1 of the *Criminal Code* provides:

> 742.1 - Imposing of a Conditional Sentence - Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court
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> (a) imposes a sentence of imprisonment of less than two years, and
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> (b) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2,
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> the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.

[29] When considering this option, the Supreme Court of Canada in **R. v. Fice**, [2005] 1 S.C.R. 742 recently offered the following guidance:

> ¶13 Therefore, Lamer C. J. held [in **Proulx**] that "the requirement that the court must impose a sentence of imprisonment of less than two years can be fulfilled by a preliminary determination of the appropriate range of available sentences" (para. 58). Of course, the overall approach to s. 742.1 suggested by Lamer C.J. still requires a sentencing judge to proceed in two stages: first, the judge must determine if a conditional sentence is available; if it is, the judge must then determine if it is appropriate. However, at the first stage of this analysis, Lamer C.J. made it clear that the judge need not impose a term of imprisonment of a fixed duration; rather, the judge need only exclude two possibilities: (i) probationary measures, and (ii) a penitentiary term. Lamer C.J. explained that "[i]f either of these sentences is appropriate, then a conditional sentence should not be imposed" (para. 58). In making this preliminary determination, he noted that "the judge need only consider the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2 to the extent necessary to narrow the range of sentence for the offender" (para. 59).

[30] Proceeding with this approach, I have already concluded that this offence commands incarceration. In other words, probationary measures cannot adequately address the objectives of denunciation and deterrence. Yet, for the reasons noted, a federal term is as well unnecessary. Also, I note that this offence carries no minimum term of imprisonment. Furthermore, I believe that Mr. Marsman, no longer represents a danger to the community. I say this for several reasons.

[31] The truly exceptional outpouring of community support (as evidenced by the numerous letters of support and *vive voce* testimony) is significant. While no supporter has attempted to downplay the seriousness of the assault, as noted above, they all suggest that this attack was totally out of character for an otherwise well liked and respected community volunteer. Here are a few examples of the letters filed by consent:

> I have known Charles for about 8 years and he is a great kid. I know Charles to be a decent type of fellow who is extremely honest and respectful to everyone he meets. He is very approachable and friendly despite his size and persona. The accusations against [him] seem to be totally out of character for him.
>
> *Stan Miklasz, C.O.2, Toronto Jail, Ministry of Correctional Services*

> I have worked in inner city Toronto and Edmonton with many offenders, but Mr. Marsman has always impressed one as polite and respectful. He comes for scheduled appointments; does not, to my knowledge, use drugs or alcohol and follows my advice. He has undergone a training program to become a truck driver and works in the community as a basketball coach.
>
> *Dr. Stephen O'Keefe, M.D., C.C.F.P.*

> ... Chuckie has always shown himself to be a kind, helpful and forthright individual with a warm heart and a great sense of humour. On occasion, I would spot Chuckie at the local YMCA where he would assist the youth in the community basketball program.
>
> *Rick Anderson, Drug Prevention Specialist*

> I have always known Charles to be a caring, conscientious, smart and respectable young man. I have never known Charles to behave in the manner that has caused Charles to come before the court. Based on my knowledge of Charles such conduct is totally out of character.
>
> *Ms. Terry Downey, Executive Vice President, Ontario Federation of Labour*

[32] Mr. Marsman's community support was also acknowledged by his probation officer, Phil Josey, when he reported to the court:

> This writer received numerous e-mails and comments and has spoken to several people in the community with respect to the subject and the outpouring of support has been unprecedented. ... In conclusion, this writer believes the young man would benefit from ongoing counselling and support which is readily available in the community and which he has taken advantage of since this particular incident took place. He is viewed as a most suitable candidate for community supervision along with any other sentence imposed.

[33] Furthermore, the updated medical evidence shows that Mr. Marsman has made significant strides to address his mental illness and is well on the road to rehabilitation. His treating psychiatrist observed:

> ... Mr. Marsman was very forthcoming regarding his personal issues and continued to appear quite committed to developing a deeper/better understanding of himself, and associated coping strategies. Overall, Mr. Marsman has shown both an openness and willingness to be an active participant in his psychiatric care.
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> *Dr. Ursula Wawer, August 11, 2006*

[34] This then takes me to the final consideration; that is, whether, considering all these circumstances, a community sentence would be nonetheless "consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2". For the following reasons, I believe that it would.

[35] Again, I begin by reflecting on the serious crime of aggravated assault and especially the vicious nature of this attack on an unsuspecting peace officer. Yet at the same time, I harken back to the truly unique circumstances of this offender which I have summarized above.

[36] Furthermore, while under the suspended sentence now for approximately nine months, Mr. Marsman had abided by all conditions, including 75 hours of community service work. He continues to make significant strides towards rehabilitation. In short, I believe that institutional incarceration is no longer necessary to appropriately address all applicable sentencing objectives and principles.

The Appropriate Term

[37] Turning to the length of the term, I conclude that two years less one day would be appropriate. This takes into account all the relevant circumstances including the fact that Mr. Marsman will be spared institutional incarceration. As Lamer, C.J. observed in **Proulx**, the length of a term can be increased to account for the fact that it will be served not *behind bars* but in the community**:**

> ¶54 This second step of the analytical process would effectively compromise the principles of sentencing that led to the imposition of a sentence of imprisonment in the first place. For instance, the principle of proportionality, set out in s. 718.1 as the fundamental principle of sentencing, directs that all sentences must be proportional to the gravity of the offence and the degree of responsibility of the offender. When a judge -- in the first stage - decides that a term of imprisonment of "x months" is appropriate, it means that this sentence is proportional. If the sentencing judge decides -- in the second stage -- that the same term can be served in the community, it is possible that the sentence is no longer proportional to the gravity of the offence and the responsibility of the offender, since a conditional sentence will generally be more lenient than a jail term of equivalent duration. Thus, such a two-step approach introduces a rigidity in the sentencing process that could lead to an unfit sentence.

[38] This takes me to my final consideration - the conditions of Mr. Marsman's community sentence. I believe that this sentence should, as much as possible, mirror a period of institutional incarceration. Again I am guided by Lamer, C.J. in **Proulx**:

> ¶29 The conditional sentence is defined in the Code as a sentence of imprisonment. ... Parliament intended imprisonment, in the form of incarceration, to be more punitive than probation, as it is far more restrictive of the offender's liberty. Since a conditional sentence is, at least notionally, a sentence of imprisonment, it follows that it too should be interpreted as more punitive than probation.
>
> ...
>
> ¶36 Accordingly, conditional sentences should generally include punitive conditions that are restrictive of the offender's liberty. Conditions such as house arrest or strict curfews should be the norm, not the exception. As the Minister of Justice said during the second reading of Bill C-41 (House of Commons Debates, supra, at p. 5873), "[t]his sanction is obviously aimed at offenders who would otherwise be in jail but who could be in the community under tight controls" (emphasis added).

> ¶37 There must be a reason for failing to impose punitive conditions when a conditional sentence order is made. Sentencing judges should always be mindful of the fact that conditional sentences are only to be imposed on offenders who would otherwise have been sent to jail. ...
>
> ¶41 This is not to say that the conditional sentence is a lenient punishment or that it does not provide significant denunciation and deterrence, or that a conditional sentence can never be as harsh as incarceration. As this Court stated in **Gladue**, *supra*, at para. 72:
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> > ... in our view a sentence focussed on restorative justice is not necessarily a "lighter" punishment. Some proponents of restorative justice argue that when it is combined with probationary conditions it may in some circumstances impose a greater burden on the offender than a custodial sentence.
>
> A conditional sentence may be as onerous as, or perhaps even more onerous than, a jail term, particularly in circumstances where the offender is forced to take responsibility for his or her actions and make reparations to both the victim and the community, all the while living in the community under tight controls.

[39] Thus, I conclude that Mr. Marsman should be initially under house arrest and then, to reflect what would have been parol eligibility, after 16 months (and for the balance of the term), he should be under a strict curfew. See: **R. v. Jacobson**, [2006] O. J. No. 1527 (Ont. C.A.).

[40] Throughout the complete term Mr. Marsman shall:

- keep the peace and be of good behaviour;
- appear before the court when required to do so by the court;
- report to a supervisor within ten working days after the making of the Conditional Sentence Order and thereafter as required by the supervisor and in a manner directed by the supervisor;
- remain within the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the supervisor;
- notify the court or the supervisor in advance of any change of name or address, and promptly notify the court or the supervisor of any change of employment or occupation;

- participate in and cooperate with any assessment, counselling and programs if directed to attend by the supervisor;

- abstain from the purchase, possession and consumption of drugs as defined in the *Controlled Drugs and Substances Act* except in accordance with a medical prescription prescribed to you by a licensed physician;

- abstain from the purchase, possession and consumption of alcohol;

- abstain from owning, possessing or carrying any weapon including any offensive weapon/ammunition/explosive substance or weapon as defined in the *Criminal Code*;

[41] While under house arrest, Mr. Marsman shall:

- be confined to his residence and may be only entitled to leave for the purposes of employment; to perform volunteer work as approved by his supervisor; to attend appointments with his supervisor; to obtain medical treatment for himself or immediate family members; and otherwise, if written permission is first obtained by his supervisor, for any other purpose. When going to and returning from these activities, he shall take a direct route.

- always carry a copy of his conditional sentence order with him when he is outside his residence and to present himself promptly at the door of his residence upon request by his supervisor or any police officer.

[42] While under the curfew, Mr. Marsman shall be within his residence from 11:00 p.m. to 6:00 a.m. seven days a week, subject only to the following exceptions:

- when going to, attending at, or returning from his place of employment by a direct route;

- when at a regularly scheduled appointment approved by his supervisor, and travelling to and from that appointment by a direct route; and

- when dealing with a medical emergency involving himself or a member of his household.

- otherwise, if written permission is first obtained by his supervisor, for any other purpose.

[43] Finally I note that the judge issued a primary DNA order and directed a lifetime firearms prohibition. I would not disturb either of these.

DISPOSITION

[44] I would allow the appeal and replace the three-year suspended sentence with a term of incarceration of two years less one day, to be served in the community on the conditions detailed above. All other aspects of the sentence would remain unchanged.

[45] The respondent shall attend forthwith before the Registrar of the Court of Appeal at Halifax on May 30, 2007, at 10:00 a.m., for completion of the conditional sentence order in compliance with s. 742.3(3) of the *Criminal Code*.

MacDonald, C.J.N.S.

Concurred in:

Saunders, J.A.

Oland, J.A.